81-2202

No. . . . . .

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WESTINGHOUSE ELECTRIC CORPORATION,
Defendant-Petitioner,

v.

GEORGE TRIBBLE,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RICHMOND C. COBURN
JOHN R. MUSGRAVE
RUTH M. ZIMMERMAN
COBURN, CROFT & PUTZELL
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
314-621-8575
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

This case involves the interpretation and application of the Age Discrimination in Employment Act (the "ADEA"). It raises serious questions as to what constitutes proof of a violation of the ADEA, particularly in the context of a corporate reorganization entailing the elimination of jobs.

The questions presented are:

I. What is the proper allocation of burdens and order of presentation of proof in the trial of a case brought under the ADEA?

II. In light of the discrimination cases previously decided by this court, culminating in **Texas Department of Community Affairs** v. **Burdine,** did the Eighth Circuit err in holding that there was evidence of discrimination where the employer produced evidence of legitimate, nondiscriminatory reasons for its actions, and there was no direct evidence of discrimination and no evidence of pretext?

III. What are the proper standards to be applied in determining whether a plaintiff in a discrimination case makes out a submissible jury case where the defendant presents evidence of legitimate, nondiscriminatory reasons for its actions?

IV. Did the Eighth Circuit Court of Appeals err in holding, in conflict with decisions of other circuit courts of appeals, that a sixty-three-year-old employee who elected early retirement after his position was eliminated due to adverse economic conditions established a prima facie case of age discrimination?

RULE 28.1
LISTING OF ALL SUBSIDIARIES AND AFFILIATES OF WESTINGHOUSE ELECTRIC CORPORATION
(Excluding Wholly Owned Subsidiaries)

Ateliers de Constructions Electriques de Charleroi, S.A.
B. F. Sturtevant Canada Inc.
Bayou Cablevision, Inc.
Bridgeport Community Antenna Television Company
Cable TV General, Inc.
CATV Enterprises, Inc.
CDSW Ireland Limited
Cemac Westinghouse Pty. Ltd.
China Industry Services Co., Ltd.
CMW Equipamentos, Ltda.
CMW Sistemas, Ltda.
Compagnie des Dispositifs Semiconducteurs Westinghouse
El Paso Cablevision, Inc.
Electrics (1978) Inc.
Electrocontroles Villares, Ltda.
Electro - Fanal S.A.
Eletromar Industria Eletrica Brasileira, S.A.
Eletromar Nordeste, S.A.
Endurance Electric Pty. Limited
Ercole Marelli & Company, S.p.A.
Focus Cable of Oakland, Inc.
Funktionelle Musik GMBH
Galileo Argentina C.I.S.A.
Galileo Uruguaya, S.A.
Grosse Point Cable, Inc.
Home Theater Network, Inc.
IEM S.A.
Industria IEM, S.A. de C.V.
Industrias Electronicas, S.A.
Industry Services Company of Saudi Arabia, Ltd.

Kaiser-Teleprompter of Hawaii, Inc.
Living & Learning (Cambridge), Ltd.
Metzenauer & Jung BV
Metzenauer & Jung GmbH
Metzenauer & Jung Ltd.
Mex Control, S.A. de C.V.
Mitsubishi Nuclear Fuel Co., Ltd.
Moorebank Properties Pty. Limited
Motores Electricos de Juarez S.A. de C.V.
Norddeutsche Elektrotechnische Werke Metzenauer & Jung GmbH
Ottermill Products Limited
Piedmont Cablevision, Inc.
Saw Mill River Cablevision, Inc.
Schneider S.A.
Silectra, S.A. de C.V.
Societa Progettiazione Reattori Nucleari, S.p.A.
Southwest Video Corporation
Telcom Cablevision, Inc.
Teleprompter of Avon Lake, Inc.
Teleprompter of Columbia Heights/Hilltop, Inc.
Teleprompter of Denver, Inc.
Teleprompter of Erie, Inc.
Teleprompter of Kentucky, Inc.
Teleprompter of Lorain County, Inc.
Teleprompter of Milwaukee, Inc.
Teleprompter of Sacramento, Inc.
Teleprompter of St. Bernard, Inc.
Teleprompter of St. Paul, Inc.
Teleprompter of Sheffield Lake, Inc.
Teleprompter of Worcester, Inc.
T.P.T. S.A. de C.V.
Tranco Electronics Pty. Limited
Transformadores de Distribucion Trade, S.A.
Transformadores TPL S.A.
Tyree Electrical Co. Pty. Limited
Tyree Industries Limited

Tyree Industries (N.Z.) Pty. Limited
Tyree Industries (Qld.) Pty. Limited
Tyree Industries (S.A.) Pty. Limited
Tyree Industries (Vic.) Pty. Limited
Tyree-Power Construction Limited
Tyree-Power Construction (Auckland) Limited
Vektron S.A.
Wescan Europe Limited
Westinghouse Asia Controls Corp.
Westinghouse Canada Inc.
Westinghouse Electric-MK Limited
Westinghouse Electric Supply Company of Saudi Arabia
Westinghouse Electro Metalurgicas C.A.
Westinghouse (Jamaica) Ltd.
Westinghouse Proyectos Electricos, S.A.
Westinghouse, S.A.
Westralian Transformers Pty. Limited
Westrans (W.A.) Pty. Ltd.
Wexico Systems and Services, Ltd.
W. T. Engineering Pty. Limited

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Westinghouse Electric Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 4, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is published at 669 F.2d 1193, and is attached hereto as Appendix A. The opinion affirmed the decision of the United States District Court for the Eastern District of Missouri, per Judge H. Kenneth Wangelin. The District Court's memorandum and order of May 30, 1980 is reported at 508 F.Supp. 14, and is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 4, 1982. A petition for rehearing was filed in the Court of Appeals and was denied on March 4, 1982. This petition for certiorari has been filed within ninety days of the denial of rehearing by the Court of Appeals for the Eighth Circuit. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This matter involves the Age Discrimination in Employment Act (29 U.S.C. §§621-634), attached hereto as Appendix C.

STATEMENT OF THE CASE

Plaintiff filed an action in the United States District Court for the Eastern District of Missouri, alleging that he was discharged and forced to retire and resign from Westinghouse Electric Corporation's ("Westinghouse") employ, in violation of the Age Discriminatio. :n Employment Act. Plaintiff invoked jurisdiction of the District Court pursuant to 28 U.S.C. §1343 and 29 U.S.C. §621 *et seq.* A jury returned a verdict in favor of plaintiff for $55,710.00 in actual damages, which was reduced by a remittitur of $11,275.00 filed by plaintiff.[1] Upon appeal to the Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §1291, the judgment of the district court was affirmed.

Prior to the events leading up to this lawsuit, plaintiff was employed by Westinghouse in its Business Development Department ("BDD") as a business development representative based in St. Louis, Missouri (Tr. 254). Prior to 1978, the BDD was divided into seven geographical regions and consisted of a total

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[1] The district court denied defendant's motion for a new trial on the condition that plaintiff file the remittitur.

of twenty Westinghouse employees, including regional managers and business development representatives (Tr. 259). The basic duty of a business development representative was to search out planned or potential construction projects within the representative's assigned area which would represent potential customers for the purchase of Westinghouse products, and to make contacts with the construction firms involved (Tr. 102, 309). However, regular salesmen with more technical knowledge, rather than business development representatives, would usually handle the actual sale of Westinghouse products to construction firms (Tr. 102-103).

At trial, Westinghouse produced evidence to show that during 1977, it was determined that the BDD would have to be reorganized and some jobs within the BDD would have to be eliminated, due to an anticipated reduction in the BDD budget for 1978 (Tr. 256-258). To determine which positions would be eliminated, BBD management looked at the potential of each geographical area involved, and determined which areas of responsibility could be overlooked or absorbed by other areas (Tr. 259-260). The total number of professional personnel within the BDD was reduced from twenty to eleven. The original seven regions were reduced to five (nine positions and two regions were eliminated), and offices in four cities, including St. Louis, were entirely closed (Tr. 259, 266).

Plaintiff, then sixty-two years of age, held a position as a business development representative in the Southwest Region, and was the only such representative in St. Louis (Tr. 268). Westinghouse presented uncontroverted evidence which showed that as a consequence of the reorganization of the BDD and the closing of the St. Louis BDD office, the job then held by plaintiff was eliminated (Stipulation p. 1, Tr. 268). At the same time, another business development representative in the Southwest Region, also sixty-two years old, was retained (his job was not eliminated in the reorganization) (Tr. 268). Furthermore, there were two business development representatives other than plain-

tiff, ages 38 and 44, whose jobs were eliminated and who were not transferred to other employment within Westinghouse, but left the company (Tr. 266-267).

Plaintiff testified that at the time his supervisor, K. W. McCall, called to inform Plaintiff (in December, 1977) that the St. Louis office would be closed and plaintiff's job would be eliminated effective January 31, 1978, he and Mr. McCall discussed the possibility of finding another job within Westinghouse for plaintiff, but they *did not* discuss early retirement (Tr. 105-106). Plaintiff admited that when Mr. McCall was in St. Louis several days later, Mr. McCall submitted the necessary forms on plaintiff's behalf to Westinghouse's reassignment department in Pittsburgh, which sometimes assisted in matching available employees with job vacancies within Westinghouse (Tr. 107-108). However, although admitting that other employees of Westinghouse made efforts on his behalf to find him reassignment, plaintiff also testified that the *only* option presented to him at that time was to elect to take early retirement (Tr. 109). Furthermore, plaintiff testified that on the same day, before he knew whether there were any other job openings within Westinghouse for which he was qualified, or whether any such openings would be offered to him, and before he even knew of the nature of the reorganization going on within the BDD which had caused the elimination of his job, plaintiff told Mr. McCall that he intended to sue Westinghouse, and he would see Mr. McCall in court (Tr. 111-113).

Mr. McCall and plaintiff also met with A. C. Davison, the District Administration Manager in Westinghouse's St. Louis office facility, in December, 1977 (Tr. 66). Mr. Davison gave plaintiff a form entitled "Request for Early or Selected Retirement," which plaintiff did not sign at that time (Tr. 66, 315; Plaintiff's Ex. 9). Plaintiff testified that the extent of the conversation was Mr. Davison's statement to plaintiff that "[w]e have a form for you to sign so that you can get your pension"

(Tr. 118). Mr. Davison testified that in this one and only face-to-face meeting with plaintiff, he did not request or tell plaintiff to sign the retirement form, but merely offered plaintiff assistance in determining to what benefits he was entitled, and proferred the early retirement election form which plaintiff could utilize if he desired to elect early retirement; plaintiff presented no evidence to contradict Mr. Davison's testimony (Tr. 315-316).

Since his job was being eliminated for budgetary reasons, plaintiff was presented with the choice of (1) receiving early retirement benefits commencing immediately, although in an amount less than benefits received at normal retirement, or (2) waiting to receive full retirement benefits approximately eighteen (18) months later, meanwhile taking advantage of any available unemployment benefits (Tr. 81-82). Plaintiff later signed the early retirement election form, thus electing to begin receiving reduced pension benefits at age 63, rather than full pension benefits at age 65 (Tr. 82; Plaintiff's Ex. 9). There was no evidence that plaintiff was coerced by Westinghouse into making that decision. To the contrary, plaintiff did not sign the form for several months, and had retained counsel prior to making the election (Defendant's Ex. PP; Plaintiff's Ex. 9).

Plaintiff presented no evidence to indicate his job was eliminated for any reason other than the reorganization of the BDD, nor did he present evidence to show that the reorganization occurred for any reason other than budgetary cutbacks. At trial plaintiff alleged that there were four jobs within Westinghouse which should have been offered to him: territory representative in the Residential and Commercial Air-Conditioning Division ("RCAC") in Kansas City, Missouri; sales representative in the Lamp Division in St. Louis, Missouri; Area Manager in the BDD in southeast Florida; and business development representative in the BDD in Chicago (Tr. 69, 72, 93-94).

Plaintiff testified that his only work experience in the last twelve (12) years prior to the elimination of his job had been

that of a business development representative or the equivalent thereof in St. Louis, Missouri and Memphis, Tennessee (Tr. 52, 105). There was no evidence that plaintiff was *currently* qualified to make sales in any particular technical field. Westinghouse presented extensive testimony as to the superior qualifications of the persons hired or transferred into the four positions in question to explain why it did not offer those jobs to plaintiff (Tr. 156-158, 170-186, 192-193, 207-213, 222-238, 249, 304-307, 330-332, 334-336; Defendant's Ex. J). Plaintiff presented no evidence which would show that the reasons those persons were hired or transferred, in preference to him, were not as stated by Westinghouse. Nor was there any evidence that plaintiff was qualified for any job other than that of a business development representative in the St. Louis area, nor that he was more than qualified than, or even as qualified as, the persons who filled those other jobs.

The evidence showed that plaintiff applied for only two (2) of the four (4) jobs which he claimed should have been offered to him — the job in the RCAC Division and the job in the Lamp Division (Tr. 69, 72, 214). Neither of those jobs which plaintiff applied for was in the BDD, and thus they were not affected by the same budgetary problems facing the BDD. Plaintiff never applied for the two jobs in the Business Development Department which became vacant *after* the reorganization was completed, and those two jobs were filled by intra-company transfers. Westinghouse produced extensive uncontradicted evidence that the Area Manager job in Florida required managerial experience, bilingual capabilities and other qualifications and experience possessed by the person who transferred into the job, but not possessed by plaintiff (Tr. 223-224, 236-237). Plaintiff presented no evidence that those requirements were not valid, or that they were met by plaintiff, or that they were not met by the person transferred into the job. The other job in the BDD was similar to that held by plaintiff, but was located in a different geographical area. Westinghouse

produced uncontradicted evidence that the person transferred into that job was already familiar with the territory and the contacts for the job (Tr. 304-307). Again, plaintiff did not submit any evidence of any knowledge of that geographical area or the contacts needed, nor did he submit any evidence to suggest that those were not valid considerations.

The case went to trial on February 4, 1980, and the jury returned its verdict on February 7, 1980. In his Memorandum and Order following trial, District Judge Wangelin found that there was sufficient evidence to support a verdict for the plaintiff under the ADEA (Appendix B, p. A-12). The Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court, holding that

> [e]vidence was presented from which the jury could infer that the reason for plaintiff's discharge was age . . . . We believe that the jury could reasonably believe that age, as well as the ostensible reorganization, was a determining factor in Westinghouse's decision to eliminate Tribble's position and not hire Tribble into any other available job.

Appendix A, pp. A-6-A-7.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Eighth Circuit Court Of Appeals Raises Important Questions Regarding The Proper Allocation Of Burdens And Order Of Presentation Of Proof Under The Age Discrimination In Employment Act, Which Questions Have Not Been, But Should Be, Settled By This Court.

The resolution of this case in the courts below depended upon the determination of what burdens should be imposed upon the plaintiff and the defendant in a cause of action arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634, and the proper monitoring by the court of those burdens when the case is tried to a jury. However, this Court has not yet addressed those issues in the context of a case brought under the ADEA. At the same time, reorganizations and the elimination of jobs, as in the present case, are common in a declining economy, so that it is inevitable that cases will continue to be brought under the ADEA, even when the employer's true motive is economic, rather than discriminatory, in nature. In view of the increasing frequency of such cases in recent years, it is imperative that this Court set out guidelines to be followed by the courts in determining (1) what constitutes proof of a violation of the ADEA (i.e., whether the plaintiff and/or defendant have satisfied their respective burdens), and (2) whether genuine fact issues have been raised in order to submit the case to a jury.

Petitioner recognizes that this Court has considered the issues regarding the allocation of burdens and the order of presentation of proof in the context of discrimination cases brought under Title VII of the Civil Rights Act of 1964, in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1979), *Furnco Construction Co. v. Waters,* 438 U.S. 567 (1978) and *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Petitioner also recognizes that the principles set out in

the *McDonnell Douglas* line of cases have been applied to age discrimination cases by virtually all of the Courts of Appeals.[2] However, a distinction between Title VII cases and ADEA cases *has* been recognized:

> Because the aging process causes employees constantly to exit the labor market while younger ones enter, simply the replacement of an older employee by a younger worker does not raise the same inference of improper motive that attends replacement of a black by a white person in Title VII cases.

Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 591-592, *rehearing denied*, 582 F.2d 966 (5th Cir. 1978). Petitioner therefore respectfully requests that this Court now conclusively determine the exact standards to be applied in ADEA cases.

Even if this Court concludes that *McDonnell Douglas* and its successors sufficiently set out the guidelines as to the allocation of burdens and the order of presentation of proof in age discrimination as well as Title VII cases, this Court should still grant certiorari for the reasons that (1) the Eighth Circuit has decided this case in a manner which is in conflict with the applicable Title VII decisions of this Court, as cited above; (2) this Court has not set out guidelines to aid the courts below in deter-

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[2] *See Smith v. Farah Manufacturing Co., Inc.*, 650 F.2d 64, 67 (5th Cir. 1981); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 411 (9th Cir. 1981); *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 919-920 (2d Cir. 1981); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1222 (7th Cir. 1980),*cert. denied*, 450 U.S. 965 (1981); *Smithers v. Bailar*, 629 F.2d 892, 894 (3rd Cir. 1980); *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980); *Loeb v. Textron*, 600 F.2d 1003, 1010 (1st Cir. 1979); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 60 (10th Cir. 1979); *Hughes v. Black Hills Power & Light Co.*, 585 F.2d 918, 919 (8th Cir. 1978); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 311-312 (6th Cir. 1975).

mining whether genuine fact issues have been raised in discrimination cases so as to require submission of the case to a jury, and the decision of the Eighth Circuit in that regard conflicts with the decisions of other circuits; and (3) the decision of the Eighth Circuit that plaintiff's election of early retirement after his position was eliminated due to adverse economic conditions established a prima facie case of age discrimination is in conflict with decisions of other circuit courts of appeals. These reasons for granting the writ of certiorari are more fully discussed below.

II. In Light Of The Discrimination Cases Previously Decided By This Court, Culminating In *Texas Department Of Community Affairs v. Burdine*, The Eighth Circuit Erred In Holding That There Was Evidence Of Discrimination Where The Employer Produced Evidence Of Legitimate, Nondiscriminatory Reasons For Its Actions, And There Was No Direct Evidence Of Discrimination And No Evidence Of Pretext.

In the case of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court held that, in a discrimination case where the defendant has produced evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason, the presumption of discrimination raised by a prima facie case is rebutted. *Id.* at 254-255. In order to prevail in such a case, the plaintiff must either present direct evidence that a discriminatory motive more likely than not motivated the employer, or present evidence that the employer's proffered explanation is a pretext. *Id.* at 256. The opinion of the Eighth Circuit in this case is in direct conflict with that rule because it allows plaintiff to recover in a discrimination case where defendant, Westinghouse, presented legitimate, nondiscriminatory reasons for its actions, and plaintiff at no time submitted any direct evidence of discrimination or evidence that the reasons proffered for Westinghouse's actions were pretextual.

Plaintiff alleged that he was discharged and forced to elect early retirement because of his age. Plaintiff, at best, raised a prima facie case of discrimination.[3] Any such prima facie case, however, was rebutted by Westinghouse's explanation for its actions. Westinghouse presented evidence to show that plaintiff's job was eliminated during a departmental reorganization caused by budgetary restrictions, and plaintiff was not offered any of the four jobs he claimed he should have been offered because the persons hired for or transferred into those jobs were more qualified than plaintiff. Such an explanation is sufficient, under the standards set forth in *Burdine*, to rebut the plaintiff's prima facie case. Plaintiff produced no evidence of direct discrimination, such as being told his position was being eliminated because he was too old, or statistical evidence tending to show discrimination. Nor did plaintiff present any evidence to show that the proffered explanation was a pretext - there was no evidence of any other reason for the reorganization, and there was no evidence that plaintiff was qualified for any job other than that of a business development representative in the St. Louis area (the job he had held for the last 12 years), nor that he was more qualified than, or even as qualified as, the persons who filled those other jobs.

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[3] In the Court of Appeals, Westinghouse denied plaintiff even raised a prima facie case of discrimination, since his job was eliminated and he was not replaced, and no evidence was produced to show that plaintiff was qualified for any job other than that of a business development representative. However, Westinghouse assumed, for purposes of argument only, that a prima facie case had been made. The same assumption will be made for purposes of argument here, although Westinghouse still maintains that plaintiff did not raise even a prima facie case of discrimination for the reasons that (1) he was not replaced by a younger person, since his job (and the St. Louis office) was totally eliminated, (2) plaintiff did not produce any evidence that he was qualified for the four jobs he claimed should have been offered to him, and (3) plaintiff did not even apply for the two jobs in the BDD. This issue is discussed in more detail in Section IV below, at pp. 18-23.

The decision of the Eighth Circuit Court of Appeals questions the reality of the reorganization of the department in which plaintiff was employed, although no evidence was presented to show that the reorganization occurred for any reason other than legitimate budgetary considerations. There are numerous decisions by other federal courts of appeals, as well as the Eighth Circuit, which hold that a reorganization due to financial difficulties is a legitimate, nondiscriminatory reason for the elimination of an employee's job.[4] However, contrary to those previous decisions, the Eighth Circuit has now held that such a reorganization was not a legitimate reason, even though there was no evidence to that effect. Furthermore, the Eighth Circuit has ignored the holding of *Burdine* that the *mere statement* of legitimate reasons for the employer's actions is sufficient to rebut any inference raised by a prima facie case. There was no evidence other than the plaintiff's own conclusory allegations to suggest that the reorganization was a pretext, yet the Eighth Circuit questioned the validity of the reorganization. The Eighth Circuit thus imposed the burden of *proof* on Westinghouse with regard to the legitimacy of the reorganization, rather than a mere burden of coming forward, which is a heavier burden than is required under *Burdine*.

The Eighth Circuit has now also imposed a new requirement, not previously required by any federal court of appeals, that an employer find other employment for an employee whose job is eliminated due to budgetary restrictions, regardless of the correlation between that employee's qualifications and any

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[4] *See Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982); *Smith v. Farah Manufacturing Co.*, 650 F.2d 64 (5th Cir. 1981); *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981); *Sahadi v. Reynolds Chemical*, 636 F.2d 1116 (6th Cir. 1980); *Schwager v. Sun Oil Co.*, 591 F.2d 58 (10th Cir. 1979); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978); *Marshall v. Roberts Dairy Co.*, 572 F.2d 1271 (8th Cir. 1978); *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977).

available jobs, and regardless of the superior qualifications of other new or existing employees. The precedent of the Court of Appeals in this case will now expose employers to liability for discrimination for not offering a job to a person protected by the ADEA even when that person didn't apply for that job.[5] The Eighth Circuit has thus placed the burden on the employer to treat persons protected by the Age Discrimination in Employment Act more favorably than those who are not so protected. That is not the stated purpose of the ADEA (*see Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978); *see also Texas Department of Community Affairs v. Burdine*, 450 U.S. at 259).

The Eighth Circuit discredited Westinghouse's financial difficulties because other persons were allegedly hired at the same time that plaintiff's job was eliminated. However, two of the four jobs involved were in divisions other than the Business Development Department, and no claim was made that those divisions were having budgetary problems. Furthermore, plaintiff submitted no evidence that he was qualified for either of those two jobs. There was thus no evidence to show any pretext in Westinghouse's detailed explanation that the persons hired for those jobs were more qualified than plaintiff.

At best, plaintiff raised an inference of discrimination by purportedly establishing a prima facie case. However, under *Burdine*, any such inference was rebutted by Westinghouse's explanation of its legitimate, nondiscriminatory reasons for its ac-

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[5] The Eighth Circuit ignored the fact that plaintiff never applied for either of the BDD jobs in question. See Appendix A, pp. A-3,A-5.

tions.[6] The Eighth Circuit ignored the allocation of burdens as set out in *Burdine,* and concluded that

> *[e]vidence was presented from which the jury could infer* that the reason for plaintiff's discharge was age . . . . We believe that the jury could reasonably believe that age, as well as the ostensible reorganization, was a determining factor in Westinghouse's decision to eliminate Tribble's position and not hire Tribble into any other available job.

Appendix A, pp. A-6-A-7. (emphasis added).

The Court of Appeals did not note or rely upon any evidence of pretext or direct evidence of discrimination, because no such evidence was presented. The Eighth Circuit disregarded that in the absence of such evidence, there was no evidence on which to base a finding of discrimination. Since, under the guidelines of *Burdine,* Westinghouse fully rebutted any prima facie case presented by plaintiff, and there was no other evidence of discrimination, in finding that there was evidence "from which the jury could infer that the reason for plaintiff's discharge was age," the Eighth Circuit has decided a federal question in a way which is in conflict with prior applicable decisions of this Court.

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[6] The facts in the present case are similar to the facts in *Sutton v. Atlantic Richfield Co.,* 646 F.2d 407 (9th Cir. 1981). The Court there adopted the *McDonnel Douglas* allocation of burdens, as explained in *Burdine,* and found that any prima facie case was rebutted by the employer's explanation, that the plaintiff really did have a choice as to whether he should elect early retirement, and, since the prima facie case had been rebutted, the plaintiff's lawsuit was properly dismissed. *Id.* at 411-412.

III. The Decision Of The Eighth Circuit Court Of Appeals Is In Conflict With The Decisions Of Other Courts Of Appeals With Respect To The Determination Of Whether A Plaintiff Makes Out A Submissible Jury Case Of Discrimination Where The Defendant Presents Evidence Of Legitimate, Non-discriminatory Reasons For Its Actions, And Guidelines For That Determination Have Not Been, But Should Be, Defined By This Court.

Federal courts of appeals other than the Eighth Circuit, recognizing the order of presentation of proof as most recently clarified in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-256 (1981), have held that if there is no direct evidence of discrimination and no evidence of pretext, and the employer states legitimate, nondiscriminatory reasons for its actions, no genuine issue of fact exists to be decided by the jury in a discrimination case. In *Smith v. Flax*, 618 F.2d 1062 (4th Cir. 1980), the Fourth Circuit Court of Appeals upheld the District Court's entry of judgment for the employer, notwithstandng the jury's verdict for the employee, because the employer had rebutted any prima facie case established by the plaintiff employee with the explanation that the plaintiff's job was eliminated, the plaintiff was not qualified for other available jobs with the employer, and there was no evidence to the contrary. The plaintiff in *Smith v. Flax* did claim that he was qualified for other jobs with the employer, but the court noted that "[p]laintiff's perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant." *Id.* at 1067. The relevant facts in *Smith v. Flax* are virtually identical to the facts in the present case, yet the holding of the Eighth Circuit in the present case is in direct conflict with that of the Fourth Circuit.

The Fifth, Sixth and Seventh Circuits have also recognized the significance of the employer's explanation of its actions going uncontradicted by direct evidence or evidence of pretext. In *Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369 (5th

Cir. 1980), as in the present case, there was no evidence presented to contradict the employer's explanation for its actions. The Fifth Circuit affirmed summary judgment in favor of the employer, noting that "[t]he possibility of a jury drawing a contrary inference sufficient to create a dispute as to a material fact does not reify to the point even of a thin vapor capable of being seen or realized by a reasonable jury." *Id.* at 371.

Similarly, in *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), the Seventh Circuit held that summary judgment in a case tried to the court (the equivalent of a directed verdict in a case tried to a jury) was proper where the employer had articulated legitimate, nondiscriminatory reasons for its actions, and the plaintiff introduced no evidence of discriminatory motive or intent. *Id.* at 1218. The Sixth Circuit has recently come to the same conclusion in *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982), granting summary judgment in favor of the employer where there was no evidence in the record to support a finding of discrimination other than plaintiff's own conclusory allegations. *Id.* at 69, 71.

The decision of the Eighth Circuit is thus in direct conflict with the decisions of the Fourth, Fifth, Sixth and Seventh Circuits. Those circuit courts of appeals held that where the prima facie case is rebutted by the employer's statement of legitimate reasons for its actions, there are no issues of fact to be considered unless the plaintiff has produced some evidence of pretext or direct evidence of discrimination. The inference of discrimination raised by the prima facie case is dispelled by the employer's explanation. *See Smith v. Flax, supra.* as noted by the Fifth Circuit Court of Appeals, "[a] mere scintilla of evidence is insufficient to present a question for the jury . . . . There must be a conflict in substantial evidence to create a jury question." *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 752 (5th Cir. 1980). The Eighth Circuit, however, has now held to the contrary, holding that, regardless of the evidence,

once a prima facie case of discrimination is established, the case should be submitted to the jury. Appendix A, p. A-6.

Instead of following the three-stage burden analysis of *Burdine* and its predecessors, as was done by the Fourth, Fifth, Sixth and Seventh Circuits, the Eighth Circuit construed *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir.), *cert. denied*, ____ U.S. ____, 101 S.Ct. 316 (1981), to stand for the proposition that once a plaintiff makes a prima facie case, *regardless of what other evidence, if any, exists,* the issue of discrimination is to be presented to the jury. Appendix A, pp. A-5-A-6. However, the Eighth Circuit failed to recognize that *Spagnuolo is* consistent with the cases cited above in that it requires direct evidence of discrimination, rather than mere inferences from a prima facie case, in order to take the case to a jury, after the employer has articulated legitimate, non-discriminatory reasons for its actions. As this Court recognized in *Burdine,* direct evidence or evidence of pretext is required because the inferences raised by a prima facie case are dispelled by the employer's articulation of legitimate reasons for its actions. 450 U.S. at 256. The Eighth Circuit thus construed *Spagnuolo* incorrectly, and, in the process, disregarded this Court's holding in *Burdine.*

The Eighth Circuit's analysis ignored that in the absence of direct evidence of discrimination or evidence of pretext, there was no issue of fact to be submitted to the jury, and instead improperly concluded that there were fact issues raised to be submitted to the jury. The Fourth, Fifth, Sixth and Seventh Circuit Courts of Appeals have recognized that, in such a situation, no fact issues remain. In order to make any finding of discrimination where the prima facie case has been rebutted and no direct evidence of discrimination or evidence of pretext exists, the jury would be required to guess or conjecture at Westinghouse's motives. It is to prevent such speculation that the order of presentation of proof in discrimination cases, as most recently clarified in *Burdine,* was created. *See Sahadi v. Reynolds Chemical,* 636 F.2d 1116, 1117 (6th Cir. 1980).

Petitioner respectfully requests that this Court now clarify the standards to be applied in ADEA cases to determine whether a conflict in the evidence, sufficient to create fact issues to be presented to a jury, really exists. The Fourth, Fifth, Sixth and Seventh Circuits have already made the determination that no such conflict exists where there is no evidence to contradict the employer's explanation for its actions, but the Eighth Circuit has now held to the contrary. It is submitted that certiorari therefore should be granted in order to eliminate conflicting results in the circuit courts of appeals.

IV. The Eighth Circuit Court Of Appeals Erred In Holding That A Sixty-Three-Year-Old Employee Who Elected Early Retirement After His Position Was Eliminated Due To Adverse Economic Conditions Established A Prima Facie Case Of Age Discrimination, And Its Decision Conflicts With Those Of Other Circuit Courts Of Appeals.

The Eighth Circuit Court of Appeals found that plaintiff was discriminated against because his job was eliminated, and Westinghouse failed to hire plaintiff into any other job within the company. However, under the guidelines previously set down by this Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), plaintiff did not even make out a prima facie case of age discrimination.

This Court has outlined the prima facie case for discrimination based on a theory of failure to hire in the Title VII area to require that the plaintiff show

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. Plaintiff failed to establish a prima facie case of discriminatory failure to hire because (1) he did not produce any evidence that he was qualified for the four jobs he claimed should have been offered to him, and (2) he did not even apply for the two jobs in the BDD.[7]

Plaintiff also did not make out a prima facie case of discriminatory discharge. The Eighth Circuit has previously held that a plaintiff's prima facie case of age discrimination based on a theory of discharge is made by showing that (1) he is within the protected age group, (2) he met applicable job qualifications, (3) despite these qualifications he was discharged, and (4) after the discharge the position remained open and the employer continued to seek applications from persons with similar qualifications.[8] *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978). The plaintiff in the present case did not make out a prima facie case of discriminatory discharge because his job did not remain open and he was not replaced by a younger person, since his job (and the St. Louis office of the BDD) was totally eliminated.

Circuit courts of appeals other than the Eighth Circuit have held, under similar circumstances, that no prima facie case of age discrimination based on a theory of discharge was made.

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[7] Plaintiff did not show he was qualified for any job other than the job of a business development representative. Although he may have been minimally qualified for the job of business development representative in Chicago, plaintiff failed to establish a prima facie case with respect to that job because he did not apply for it. There was also no evidence that applicants with plaintiff's qualifications were sought for that job (or for any of the other three jobs).

[8] This final element is often construed as a requirement that the plaintiff show he was *replaced* after his discharge. *See Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 920 (2d Cir. 1981).

The Second Circuit Court of Appeals came to that conclusion in *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981), which involved facts similar to those in the present case: the plaintiff's job was eliminated, and he was given the alternative of early retirement. The Second Circuit, however, found that the plaintiff had not established a prima facie case because he was not replaced, his position was not kept open, and there was no evidence that a new employee took over the plaintiff's work. *Id.* at 920. Although a jury in the district court had made a large award of damages to the plaintiff, the Second Circuit Court of Appeals reversed and remanded, recognizing that "the defendant's motion for a directed verdict should have been granted." *Id.* at 924. The Eighth Circuit's decision here, however, is directly in conflict with that of the Second Circuit in *Stanojev*, since the Eighth Circuit held that a prima facie case was established, even though the plaintiff's job was eliminated, his position was not kept open, and there was no evidence that a new employee took over the plaintiff's work.

Under similar circumstances, the Sixth Circuit has also held that no prima facie case was made by the plaintiff. In *Sahadi v. Reynolds Chemical*, 636 F.2d 1116 (6th Cir. 1980), the plaintiff's job was eliminated due to a reduction in the work force caused by economic factors. The plaintiff was not replaced. The district court did not submit the case to a jury, but directed a verdict for the employer. The Court of Appeals affirmed, finding that no prima facie case had been made. *Id.* at 1118-1119.

In *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977), the employer had determined that one of three substantially similar jobs in a particular office would have to be eliminated for economic reasons. The plaintiff, whose job was chosen to be eliminated, was the oldest of the three employees. However, the Fifth Circuit found that since the plaintiff's job was eliminated and he was not replaced, no prima facie case had been made, even though the plaintiff's duties were taken over by the younger employees. The facts in *Price* are substantially similar to the facts

in the present case, but the Eighth Circuit's holding is directly contrary to the Fifth Circuit's holding.

The Eighth Circuit failed to recognize that, while a position in one part of a company may be eliminated due to economic pressures, another position in another department or division may become vacant and be filled by someone other than the employee whose position was eliminated. This Court recognized in *Burdine* that "[t]he employer has discretion to choose among equally qualified candidates." 450 U.S. at 259. Particularly where the two positions are not identical, there well may be persons who are *more* qualified for the open position than the person whose job was eliminated, and who are hired for that reason, without any consideration given to the employee's age. The fact that the more qualified person is younger than the employee whose position was eliminated should not automatically mean that an employer may not hire that more qualified, but younger, person. However, the Eighth Circuit's holding that plaintiff's evidence established a prima facie case would have exactly that effect, if it is allowed to stand. Plaintiff's job was eliminated, and he was not replaced. Vacant positions different from that held by plaintiff were filled by persons best qualified for those jobs.

The holding of the Eighth Circuit is also in conflict with the decision of the Sixth Circuit Court of Appeals in *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982). In *Ackerman*, as in the present case, the plaintiff was informed that his job was being eliminated, and later signed an agreement to elect the benefits of early retirement. The plaintiff then asserted that he was given no alternative to taking early retirement, so that he really was discharged. The Sixth Circuit, however, noted that the plaintiff had produced no evidence other than his own "conclusory allegations" to show that he did not voluntarily elect early retirement. It was therefore determined that the plaintiff had failed to state a prima facie case because he did not show that he was discharged, and summary judgment

in favor of the defendant employer was affirmed. The Sixth Circuit thus held that giving an employee the choice between early retirement and termination does not constitute an element of a prima facie case under the ADEA.

The case now under consideration involves an employee who, upon being informed that his job was being eliminated, had the choice of (1) receiving early retirement benefits commencing immediately, although in an amount less than benefits received at normal retirement, or (2) waiting to receive full retirement benefits approximately eighteen (18) months later, meanwhile taking advantage of any available unemployment benefits. The choice made by the plaintiff herein to receive early retirement benefits was not made by Westinghouse, but was made by plaintiff. *See Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 922 (2d Cir. 1981). However, contrary to the Sixth Circuit, the Eighth Circuit found that one element of a prima facie case of age discrimination was that "Westinghouse confronted plaintiff with the alternative of early retirement or termination." Appendix A, p. A-5.

The issue concerning an employee's election to take early retirement, in preference to being laid off or terminated, is an important one which should be considered by this Court. Guidelines need to be established to determine when action taken with respect to an employee who is eligible for early retirement can be characterized as being motivated by that employee's age. The termination of an employee who happens to be eligible for early retirement should not automatically be considered to have been done because of that employee's age - yet, without standards to apply, a jury may believe that the act of offering an employee early retirement is a violation of the ADEA, since such an act is obviously based, in part, on the employee's age (a younger employee would not have the option of early retirement). The Sixth Circuit has held that the termination of an employee for legitimate, nondiscriminatory reasons is not a violation of the ADEA, even if that employee elects early

retirement in preference to outright termination. *Ackerman v. Diamond Shamrock Corp., supra.* If the contrary decision of the Eighth Circuit here is allowed to stand, however, the result may very well be that employers, in order to avoid liability under the ADEA, would eliminate their early retirement programs altogether. An older employee could then be terminated on the same basis as any younger employee, without any possible implication being raised by the fact that the older employee was eligible to elect early retirement.

It is thus necessary for this Court to determine whether early retirement is a benefit, as long as age is not improperly considered, (as was determined in *Ackerman v. Diamond Shamrock Corp.*), or whether, regardless of the circumstances, it is to be considered a mere subterfuge, as has now been decided by the Eighth Circuit. In connection therewith, petitioner respectfully requests that this Court now conclusively determine the exact elements which constitute a prima facie case of discrimination under the ADEA, and to resolve the conflict between the Eighth Circuit and the Second, Fifth and Sixth Circuits.

CONCLUSION

If the decision of the Eighth Circuit Court of Appeals is allowed to stand, employers will be constrained to retain employees whose jobs would otherwise validly be eliminated for budgetary reasons, or to place such employees in positions for which they are not qualified or for which better qualified persons are available. The attainment of age forty will, in effect, insulate an employee against losing his job, despite the current state of the economy and the fact that people of all ages are losing their jobs due to budgetary cutbacks. Furthermore, early retirement programs will be jeopardized, since the mere election of early retirement by an employee, although chosen by the employee, may subject the employer to liability under the Age Discrimination in Employment Act.

Based on the foregoing reasons and authorities, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHMOND C. COBURN
JOHN R. MUSGRAVE
RUTH M. ZIMMERMAN

COBURN, CROFT & PUTZELL
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
314-621-8575
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1208

George Tribble,
Appellee,

v.

Westinghouse Electric Corp.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: November 9, 1981
Filed: February 4, 19[illegible]

Before HENLEY and ARNOLD, Circuit Judges, and NICHOL,* Senior District Judge.

NICHOL, Senior District Judge.

George Tribble brought this action against defendant, Westinghouse Electric Corporation, (Westinghouse) claiming

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* Fred J. Nichol, Senior District Judge, District of South Dakota, sitting by designation.

that Westinghouse discharged him and failed to hire him because of his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. sections 621-34 (1976). The district court, the Honorable H. Kenneth Wangelin presiding, entered judgment in favor of Tribble following a jury trial. Westinghouse appeals from the judgment and from an Order entered by the district court denying Defendant's Motion for Judgment in Accordance with Defendant's Motion for a Directed Verdict, or in the Alternative, Motion for a New Trial. The district court's Order was conditioned upon filing by plaintiff of a remittitur and is reported at 508 F.Supp. 14 (E.D. Mo. 1980). Plaintiff filed the remittitur. For reasons set out more fully herein, we affirm.

Plaintiff Tribble first joined Westinghouse in 1964. Tribble continued in the employ of Westinghouse until his termination effective July 31, 1978. During his tenure at Westinghouse plaintiff's work experience encompassed sales or development work involving many different Westinghouse products. Westinghouse is divided into three companies, the Power Systems Company, the Industrial Products Company, and the Public Systems Company, as well as numerous divisions and groups within those three companies. Tribble was considered a "generalist" within a separate marketing group, the Business Development Department (BDD). The BDD was a group within the Industrial Products Company.

The BDD's function was three-fold: to maintain contact and involvement with key people at high-potential construction firms in order to increase Westinghouse's share of the market; to coordinate Westinghouse selling activities in the construction field through the use of business development teams to pool information on current projects; and to act as a resource for construction-involved divisions of Westinghouse by providing an informed overview of the marketplace and by giving assistance in reaching the appropriate markets. Tribble's basic duty as a business development representative was to search out

planned or potential customers for the purchase of Westinghouse products.

In December, 1977, Tribble was first informed that his position would be terminated due to an ostensible intra-company reorganization that would transfer the BDD from the marketing group of the Industrial Products Division to the construction group of the Public Systems Company. Tribble was to be terminated effective February 1, 1978, but remained on the payroll through July of 1978. During the interim between the December date upon which Tribble was informed of his pending termination and the actual termination date of July 31, 1978, Tribble applied for a number of different positions within the Westinghouse organization. Each position was filled by a younger person. The only option presented to Tribble was to either be terminated or take early retirement. Tribble chose early retirement under protest. The jury found that Tribble's age was a determining factor affecting Westinghouse's decision to terminate and not rehire Tribble and awarded him damages in the amount of $55,711. The jury award was subsequently reduced by remittitur to a sum of $44,435.

On appeal Westinghouse raises several assignments of error. Those assignments of error can be divided into two groups for discussion. One group involves the trial court's denial of Westinghouse's motion for directed verdict and motion for judgment in accordance with defendant's motion for a directed verdict, or in the alternative, motion for a new trial. The other group involves challenges to certain jury instructions. We will address first Westinghouse's challenge to the district court's denial of its various motions.

Westinghouse contends that the district court erred when it failed to grant Westinghouse's motion for a directed verdict because plaintiff did not come forward with any evidence that the reasons given by Westinghouse for the complained of actions were pretextual. Westinghouse has reiterated substantially

the same argument in its challenge to jury Instruction No. 8.[1] Jury Instruction No. 8 refers to the discharge issue while Westinghouse prefers to characterize the entire cause as one involving failure to hire. Westinghouse's motion following the trial was essentially one for judgment notwithstanding the verdict and will be treated as such a motion for the purpose of this discussion.

The standard for granting judgment notwithstanding the verdict is the same as that for a directed verdict. *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1235 (8th Cir. 1980); *Schneider v. Chrysler Motors Corp.*, 401 F.2d 549, 554 (8th Cir. 1968). The district court should grant a motion for

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[1] Instruction No. 8 stated: Plaintiff bases his suit on the Age Discrimination in Employment Act of 1967, which Congress enacted to prohibit arbitrary age discrimination in employment and to promote the employment of older persons on the basis of their ability. The Act further provides that the prohibitions against such arbitrary age discrimination in employment are limited to individuals who are at least forty (40) years of age but less than sixty-five (65) years of age.

Not every discharge of a person between the ages of forty and sixty-five is unlawful under the Act. The Act provides in part that it shall not be unlawful for an employer to discharge an older employee within this age bracket among certain conditions. One of them is where the differentiation is based upon reasonable factors other than age.

If the termination of the plaintiff was for bona fide business or economic reasons in which age was not a determining factor, there can be no violation of the law, and the discharge would be lawful.

The plaintiff in this action has the burden of showing by a preponderance of the proof that he was discharged from his job because of his age. It is the contention of the defendant in this case that the discharge was for bona fide and business reasons unconnected with age.

If you find that the termination was for the reason asserted by defendant, that would be the end of your investigation and you should cease your deliberations and return a verdict for the defendant in the case.

directed verdict "only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Smith v. Hussmann Refrigerator Co.*, 619 F.2d at 1235, *citing Barclay v. Burlington Northern, Inc.*, 536 F.2d 263, 267 (8th Cir. 1976). As this Court has noted,

> (A) motion for directed verdict is properly denied where the evidence presented allows reasonable men in a fair exercise of their judgment to draw different conclusions. • • • In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party.

Id.

In the present case plaintiff clearly established a prima facie case of age discrimination in that (1) plaintiff was in the protected class; (2) that during the period Westinghouse confronted plaintiff with the alternative of early retirement or termination; (3) that plaintiff took early retirement under protest; and (4) that, after the discharge and plaintiff's application for other positions for which he was qualified, the position remained open and the employer continued to seek applications from persons with similar qualifications. *See Cleverly v. Western Electric Co.*, 594 F.2d 638, 641 (8th Cir. 1979); *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 959 (8th Cir. 1978); *Marshall v. Roberts Dairy Co.*, 572 F.2d 1271, 1272 (8th Cir. 1978); *Walter v. KFGO Radio*, 518 F.Supp. 1309, 1313 (D. N.D. 1981).

Westinghouse offered evidence of a legitimate nondiscriminatory reason for discharging plaintiff, that is, Westinghouse claimed that plaintiff elected to take early retirement due to an intra-company reorganization that eliminated plaintiff's job. The mere fact that Westinghouse articulated a legitimate nondiscriminatory reason for its discharge of plaintiff does not mean that Westinghouse is entitled to have a verdict directed in its favor. "(T)he articulations of a legitimate non-

discriminatory reason is sufficient to insulate an employer from a verdict against it, *i.e.*, it dispels the adverse inference from a plaintiff's prima facie case. The jury in its consideration of all the evidence may still find that the wrong occurred in the manner established by plaintiff." *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir. 1981). We believe that the jury accepted plaintiff's version of the case and thus considered the reasons offered by Westinghouse for plaintiff's discharge to be merely pretextual.

In an action brought under the ADEA, the ultimate burden shouldered by a plaintiff is that age was a determining factor in his or her discharge. *Cleverly v. Western Electric Co.*, 594 F.2d at 641; *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d at 960; *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315-17 (6th Cir. 1975). Tribble began his employment with Westinghouse in 1964, and his Westinghouse work experience encompassed sale or development of all products in Westinghouse's construction line. He remained continuously employed until the effective date of his termination, July 31, 1978. During his employment with Westinghouse, plaintiff held a number of jobs including contract sales manager, territory sales manager and business development representative. Tribble was promoted and received salary increases. On December 16, 1977, Tribble received a telephone call from the zone manager in Houston, Texas, informing him that his position with Westinghouse would be terminated on January 31, 1978. At that time the entire construction industry was facing increasingly difficult financial difficulties. At the same time, other younger persons were hired by Westinghouse to fill positions substantially similar to that held by Tribble within the corporation. Evidence was presented from which the jury could infer that the reason for plaintiff's discharge was age. Westinghouse contended at trial that the decision to eliminate Tribble's position was based upon the intra-company reorganization. We believe that the jury could reasonably believe that age, as well as the ostensible reorganiza-

tion, was a determining factor in Westinghouse's decision to eliminate Tribble's position and not hire Tribble into any other available job. We think that the district court properly denied Westinghouse's motions for directed verdict and for judgment in accordance with defendant's motion for a directed verdict, or in the alternative, a new trial.

Westinghouse also challenged a number of jury instructions. Stated simply, Westinghouse alleges that Instruction No. 2 is erroneous on the following grounds: it incorrectly stated the fact issues to be decided by the jury; it was misleading and confusing; and stated issues as to which no evidence was presented.[2] Westinghouse also objects to Instruction No. 7 for substantially the same reasons.[3] Additionally, Westinghouse objects to giving

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[2] Instruction No. 2 stated: Your verdict must be for plaintiff George Tribble if you believe: *First,* that plaintiff George Tribble was in the protected class between the ages of forty and sixty-five years from December, 1977 through July 31, 1978, *Second,* that during that period defendant confronted plaintiff with the alternatives of early retirement or termination, *Third,* that plaintiff took early retirement under protest, and *Fourth,* that plaintiff's age was a determining factor affecting the decision made by defendant to confront plaintiff with the alternatives of early retirement or termination.

[3] Instruction No. 7 stated: If you find that plaintiff George Tribble's age was a determining factor affecting the decision made by defendant to present plaintiff George Tribble with the alternatives of early retirement or termination, then your verdict must be for plaintiff George Tribble even if you believe that other factors were also present.

The Age Discrimination in Employment Act of 1967, as amended, under which plaintiff George Tribble has brought his claim against defendant, was enacted by Congress for the purposes of prohibiting discrimination in employment on the basis of age and of requiring that employment decisions with respect to older persons be made on the basis of their abilities. The Act provides in part, "it shall be unlawful for an employer to discharge or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age."

If you find that age was a determining factor affecting plaintiff's discharge, then you must consider the question of damages.

both Instructions No. 2 and No. 7, asserting that because both instructions are verdict directors for plaintiff, when read together the instructions are inherently inconsistent and contradictory.

When considering a challenge to jury instructions, the "general rule is that the instructons must be read as a whole and considered in light of the entire charge." *King v. State Farm Life Insurance Co.*, 448 F.2d 597, 600 (8th Cir. 1971). *See also Grinder v. Southern Farm Bureau Casualty Insurance Co.*, 590 F.2d 741, 743 (8th Cir. 1979); *Simpson v. Norwesco, Inc.*, 448 F.2d 1007, 1013 (8th Cir. 1971). When the charge is considered as a whole, it should state the "governing law fairly and correctly" and should not be "inflammatory or unfair or prejudicial" to either plaintiff or defendant. *Hartman v. United States*, 538 F.2d 1336, 1346 (8th Cir. 1976). Where the instructions, considered as a whole, adequately and sufficiently state the generally applicable law, the fact that the instructions are technically imperfect or are not a model of clarity does not render the charge erroneous. *See e.g. Shelak v. White Motor Co.*, 581 F.2d 1155, 1161 (5th Cir. 1978) (mere technical imperfection); *Garnatz v. Stifel, Nicholas & Co.*, 559 F.2d 1357, 1362 (8th Cir. 1977) (instructions not a model of clarity).

In the present case, the district court's charge to the jury did include a correct statement of the applicable law. Instruction No. 2 set forth the elements that the plaintiff must prove to establish a case of age discrimination. In fact, Instruction No. 2 was altered by the trial court on the basis of Westinghouse's objection to require the jury to find that age was more than a mere factor affecting defendant's decision to confront plaintiff with the alternatives of early retirement or termination. The jury was instructed that they must find that age was a *determining* factor affecting Westinghouse's decision with regard to plaintiff's employment. The charge, as presented to the jury, is an accurate statement of the applicable law. *See Cleverly v. Western*

Electric Co., 594 F.2d 638, 641 (8th Cir. 1978); *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 960 (8th Cir. 1978); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975).

Instruction No. 7, unlike Instruction No. 2, did not list the elements of a prima facie case that a plaintiff must prove in an age discrimination case. Instruction No. 7 merely described the Age Discrimination in Employment Act and the Congressional purposes behind the act. When the instructions are read as a whole this Court cannot say that the presence of both instructions in the jury charge led to any misunderstanding or confusion. Nor are Instructions No. 2 and No. 7 inherently inconsistent or contradictory.

Both Instructions No. 2 and No. 7 are verdict directors for plaintiff. Westinghouse contends that the giving of a second verdict director prejudicially emphasized plaintiff's case. It is true that this Court has held that "(a) trial court should not needlessly repeat statements respecting theories or defenses if the effect is argumentative or tends to mislead or influence a jury." *Halladay v. Verschoor*, 381 F.2d 100, 113 (8th Cir. 1967), *citing White Auto Stores v. Reyes*, 223 F.2d 298, 305 (10th Cir. 1955). "In fact, a court should go as far as possible to avoid giving undue emphasis or prominence to a particular issue or theory." *Id.* In *Halladay v. Verschoor, supra*, the trial court repeated a theory in seven consecutive instructions. In the present case, the instructions that Westinghouse claims are repetitious appear only twice in the charge and are not consecutive. Furthermore, the case *sub judice* is more analogous to *White Auto Stores v. Reyes* than it is to *Halladay v. Verschoor*.

In *White Auto Stores v. Reyes, supra*, the "instructions objected to were statements of the law relating to the liability of an employer for the acts of his employee. There (was) no suggestion that the instructions did not correctly state the law on the subject." *White Auto Stores v. Reyes*, 223 F.2d at 305.

Although Westinghouse did object to the instructions in this case, those instructions are nonetheless correct statements of the applicable law. Furthermore, both instructions were necessary for a proper disposition of the case. We hold that the trial court did not needlessly repeat any theories in the instructions, and did not unduly emphasize plaintiff's case.

Westinghouse challenges the trial court's damage instructions alleging that those instructions were inconsistent, conflicting, unfairly repetitious, confusing and misleading. Instruction No. 3 deals with plaintiff's discharge from employment.[4] Instruction No. 4 dealt with damages that flowed from Westinghouse's failure to hire.[5] Our reading of the record indicates that there is evidence from which the jury could infer that age was a determining factor in both the decision to discharge Tribble from his then current position and not to hire Tribble for any of the other jobs available at Westinghouse for which Tribble was ostensibly qualified. Our reading of the record further indicates that the employment decisions made by Westinghouse with

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[4] Instruction No. 3 stated: If you find that plaintiff George Tribble was discharged because of his age, then you must award plaintiff back pay in the amount that he would have earned had he not been discharged, from the date he was discharged until the date of this trial, reduced by the amount of benefits and earnings from other employment received by plaintiff during that time.

[5] Instruction No. 4 stated: If you find by a preponderance of the evidence that plaintiff's age was a determining factor in plaintiff's not obtaining the job of (sic) with Westinghouse and in violation of the statute, then you should consider the amount of damage to be awarded. Plaintiff is entitled to back pay in the amount he would have earned had he continued to be employed until he reached 65 years of age, less the amount of benefits and earnings from other employment or pension benefits received by plaintiff during that time.

The amount of back pay which plaintiff would have earned had he continued to be employed by defendant until he reached 65 years of age must be reduced by the amount which plaintiff could have earned had he sought alternative employment with reasonable diligence.

regard to Tribble are not divisible and in order to explain fully the plaintiff's case to the jury it was necessary to present both the discharge and failure to hire theories. Again the district court's instructions must be read as a whole, the instructions must state the applicable law fairly and accurately and not be inflammatory or prejudicial. When Instructions No. 3 and No. 4 are considered in such a light, it is clear to this Court that no prejudicial error can be found. Whatever error might have been present was corrected by the trial court when it denied Westinghouse's motion for a new trial conditioned on plaintiff's filing of a remittitur.[4] We believe, as did the trial court, that the instructions given the jury set forth a full statement of the applicable law and adequately cover all issues raised at trial.

Plaintiff has asked this Court to enter an award of attorney's fees or grant appellee time to file a motion for attorney's fees. Counsel for appellee is directed to file a motion with the clerk of this court for attorney's fees on appeal. *See* Local Rule 17.

The judgment of the district court is in all respects affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[4] The jury awarded plaintiff $55,710 in lost wages and did not return a verdict in plaintiff's favor on the question whether Westinghouse wilfully violated the statute. The trial court conditioned its denial of a new trial upon the plaintiff's filing of a remittitur in the amount of $11,275, the amount that plaintiff earned from part-time jobs during the period covered by the lost wages award. *Tribble v. Westinghouse Electric Corp.*, 508 F.Supp. 14, 16 (E.D. Mo. 1980).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-270 C (1)

George Tribble,
Plaintiff,

vs.

Westinghouse Electric
Corporation,
Defendant,

MEMORANDUM AND ORDER

(Filed May 30, 1980)

This matter is before the Court upon defendant's motion for judgment in accordance with defendant's previous motion for a directed verdict filed at the close of all evidence herein, and defendant's alternative motion for a new trial.

The Court cannot agree with defendant's assertion that viewing the evidence in the light most favorable to plaintiff and giving plaintiff the benefit of all reasonable inferences, there was not sufficient evidence to support a verdict on behalf of plaintiff on his claim brought pursuant to the Age Discrimination In Employment Act (ADEA), 29 U.S.C. §621 *et seq.* Nor does the Court believe that the instructions given the jury did not set forth a full statement of the applicable law and adequately cover all issues raised at trial. The Court perceives no fundamental injustice in the instructions given. *See Grinder v. Southern Farm Bureau Casualty Ins. Co.*, 590 F.2d 741, 743 (8th Cir. 1979); *Hartman v. United States*, 538 F.2d 1336, 1346 (8th Cir. 1976).

There exists, however, a problem in the jury's assessment of damages. The jury awarded plaintiff Fifty Five Thousand Seven Hundred and Ten Dollars ($55,710.00) in lost wages, and did not return a verdict in favor of plaintiff on the issue of liquidated damages. The only evidence the jury could have considered in arriving at the above verdict was evidence that plaintiff was receiving Two Thousand Ninety Five Dollars ($2,095.00) per month when he left defendant's employ, that he would have received such salary for another eighteen months, and that as a result of leaving at that particular time plaintiff's pension was reduced by One Hundred Dollars ($100.00) per month. Additional evidence indicated that the average number of pension checks received by a company employee at normal retirement was one hundred and eighty. It seems beyond cavil that the jury assessed damages as follows:

$2,095.00 x 18 months	= $37,710.00
100.00 x 180 months	= $18,000.00
Total	= $55,710.00

Instruction number 4 directed the jury to deduct from their award benefits and earnings received by the plaintiff from the date he left Westinghouse until he reached sixty five years of age.

The evidence is undisputed that plaintiff performed no work for defendant after January 31, 1978, went off defendant's payroll on July 31, 1978, and plaintiff received pension benefits from defendant commencing September 1, 1978 in the amount of Three Hundred and Eighty Dollars ($380.00) per month. Plaintiff reached the age of sixty five on January 15, 1980. At that time, pursuant to defendant's pension plan, plaintiff's retirement would have been mandatory. *But see,* 29 U.S.C. § 623(f)(2). The issue of mandatory retirement pursuant to the pension plan is not before the Court, since plaintiff's termination and unsuccessful attempts to obtain other jobs with defen-

dant precluded such an outcome. Nor may the lost wages recovery period be extended beyond age sixty five. This Court has held that the 1978 Amendments to the ADEA which have (1) extended the protection of the Act from age sixty five to age seventy, 29 U.S.C. §631(a), and (2) prohibited involuntary retirement because of age pursuant to a bona fide employee benefit plan, up to age seventy, 29 U.S.C. §623(f)(2) are not to be applied retroactively. *EEOC v. Florissant Valley Fire Protection District,* 21 FEP Cases, 973, 21 E.P.D. ¶30,520 (E.D. Mo. 1979); *See Also Marshall v. Delaware River & Bay Authority,* 471 F.Supp. 886 (D.Del. 1979). Plaintiff ceased performing services for defendant January 31, 1978 and was officially administratively terminated on that day, though he continued to receive his salary until July 31, 1978. *See Moses v. Falstaff Brewing Corp.,* 525 F.2d 92, 94-95 (8th Cir. 1975). The 1978 amendments to the ADEA became effective April 6, 1978. Pub. L. No. 95-256, §3(a), 92 Stat. 189. Therefore, since plaintiff's cause of action accrued prior to the effective date of the Amendment to 29 U.S.C. §631(a) raising the upper age limitation to seventy, his cause of action is governed by the age sixty-five limitation. This precludes his claim for reinstatement.

Though plaintiff's pension benefits were vested, he had no entitlement to receive them while he remained in defendant's employ. Had plaintiff remained in defendant's employ, he would not have received any benefits until mandatory retirement at age sixty five. By virtue of defendant's violation of the Act, plaintiff received eighteen months of pension benefits totaling Six Thousand Eight Hundred and Forty Dollars ($6,840.00). Plaintiff's recovery should only return him to the financial position he would have enjoyed, but for the involuntary termination. The jury properly included in its award the pecuniary loss suffered by plaintiff because he was not able to work to age sixty five and thereby maximize his pension benefits. As such, the "interim" pension benefits must be deducted from the lost wages award as they are, on the circumstances of this case, virtually identical to severance pay.

Laugeson v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975) (severance pay); *Cf. Coates v. National Cash Register Co.*, 433 F.Supp. 655, 663 (W.D. Va. 1977); *Monroe v. Penn-Dixie Cement Corp.*, 335 F.Supp. 231, 234-235 (N.D. Ga. 1971).

Plaintiff's pension benefits from General Electric need not be deducted since payment of those benefits was not occasioned by plaintiff's termination. Plaintiff merely elected to begin receiving them in January of 1978.

Amounts which plaintiff earned from other employment were not deducted by the jury though they were required by instruction number 4 to do so. The testimony indicated that plaintiff's earnings from part-time jobs during the period covered by the lost wages award totalled at least Forty Four Hundred and Thirty Five Dollars ($4,435.00). The evidence is somewhat inconsistent as to when plaintiff was re-employed by Ranken Technical Institute and the Court has included in the above total Eight Hundred Twenty Five Dollars ($825.00) for approximately eleven weeks work between November 20, 1979 and February 7, 1980 at Seventy Five Dollars ($75.00) per week. Plaintiff's part-time earnings must be deducted from the lost wages award. *Laugeson, supra,* at 317-318; *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 373 (8th Cir. 1974); *Coates, supra,* at 663; *Bishop v. Jelleff Assocs.*, 398 F.Supp. 579, 597 (D.D.C. 1975); *Monroe, supra,* at 234-235.

Though the employment plaintiff eventually found was not comparable to his former position with defendant, there is sufficient evidence to support the jury's determination that plaintiff made adequate attempts to seek other employment and mitigate his damages.

The Court considers the jury's award of damages excessive in the sum of Eleven Thousand Two Hundred Seventy Five Dollars ($11,275.00). It is well settled that a trial court may condition denial of a motion for new trial, where the damages awarded are clearly excessive, upon the filing of a remittitur by

the recovering party. *See* 11 Wright & Miller, *Federal Practice and Procedure,* §2815 (1973).

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for judgment in accordance with its previously filed motion for a directed verdict be and is DENIED: and

IT IS FURTHER ORDERED that defendant's motion for a new trial be and is DENIED upon the condition that within thirty (30) days of service of this Order plaintiff file herein a remittitur in the sum of Eleven Thousand Two Hundred Seventy Five Dollars ($11,275.00) thereby consenting to assessment of damages in the sum of Forty Four Thousand Four Hundred and Thirty Five Dollars ($44,435.00) upon the verdict returned herein and execute and file a release in favor of defendant to the extent of the Eleven Thousand Two Hundred and Seventy Five Dollars ($11,275.00) remitted upon the judgment and verdict of Fifty Five Thousand Seven Hundred and Ten Dollars ($55,710.00); however, if such remittitur and release is not filed within thirty (30) days of service of this Order defendant's motion for a new trial will be granted, the judgment entered upon the verdict will be vacated and a new trial will be ordered solely on the issue of damages.

Dated this 30th day of May, 1980.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX C

AGE DISCRIMINATION IN EMPLOYMENT ACT
29 U.S.C. Sections 621-634

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment:

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons:

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

Employer practices

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Employment agency practices

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

Labor organization practices

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Opposition to unlawful practices; participation in investigations, proceedings, or litigation

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Printing or publication of notice or advertisement indicating preference, limitation, etc.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

Lawful practices; age as occupational qualification; other reasonable factors: seniority systems; employee benefit plans; discharge or discipline for good cause

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to inovluntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power—

Delegation of functions; appointment of personnel; technical assistance

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

Cooperation with other agencies, employers, labor organizations, and employment agencies

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ 626. Recordkeeping, investigation, and enforcement

Attendance of witnesses; investigations, inspections, records, and homework regulations

(a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Same; filing of charge with Secretary; timeliness; conciliation, conference, and persuasion

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Statute of limitations; reliance in future on administrative rulings, etc.; tolling

(e)(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this chpater, and may establish such reasonable exemptions to and from any or all provions of this chapter as he may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Secretary while he is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however,* That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

§ 631. Age limits

Individuals at least 40 but less than 70 years of age

(a) The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Employees or applicants for employment in Federal Government

(b) In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

Bona fide executives or high policymakers

(c)(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

Employees serving under contracts of unlimited tenure at institutions of higher education

(d) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing

for unlimited tenure) at an institution of higher education (as defined by section 1141(a) of Title 20).

§ 632. Annual report to Congress

The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this chapter, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as he may deem pertinent.

§ 633. Federal-State relationship

Federal action superseding State action

(a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

Limitation of Federal action upon commencement of State proceedings

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced

under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

Federal agencies affected

(a) All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Enforcement by Civil Service Commission and by Librarian of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission; compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions; bona fide occupational qualification

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

Civil actions; jurisdiction; relief

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

Same; notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

Duty of Government agency or official

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

Applicability of statutory provisions to personnel action of Federal departments, etc.

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631([illegible] of this title and the provisions of this section.

Study and report to President and Congress by Civil Service Commission; scope

(g)(1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

81-2202

No . . . . .

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WESTINGHOUSE ELECTRIC CORPORATION,
Defendant-Petitioner,

v.

GEORGE TRIBBLE,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JEFFREY E. HARTNETT
BARTLEY, GOFFSTEIN, BOLLATO & LANGE
130 South Bemiston Avenue
Suite 604
St. Louis, Missouri 63105
314/727-0922
Attorneys for Respondent

Paragon Typographers, Inc., 217 No. Tenth Street 63101 [redacted] 39 314-231-6483

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. The proper allocation of burdens and order of presentation of proof under the Age Discrimination and Employment Act is one well established by this Court and does not warrant further consideration.

II. Under *Texas Department of Community Affairs v. Burdine*, the Plaintiff produces evidence of age discrimination in his prima facie case which, after Defendant's rebuttal, is submitted to the trier of fact.

III. The Eighth Circuit Court of Appeals did not err in holding that a case is submissible to the trier of fact when the employer rebuts the employee's prima facie case by articulating a legitimate, nondiscriminatory reason for the employee's discharge.

IV. The Eighth Circuit was not in conflict with decisions of other Circuit Courts of Appeals in holding that a sixty-three year old employee who was forced to resign under protest, or be fired had established a prima facie case of age discrimination.

No . . . . .

In The

Supreme Court of the United States

October Term, 1981

Westinghouse Electric Corporation,
Defendant-Petitioner,

v.

George Tribble,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is published at 669 F.2d 1193 and is reproduced in Appendix A to the Petition. The Opinion of the District Court is reported at 508 F.Supp. 14 and is reproduced in Appendix B to the Petition.

STATEMENT OF THE CASE

Plaintiff filed an action in the United States District Court of the Eastern District of Missouri, alleging that he was discharged and forced to retire and resign from Westinghouse Electric Corporation's (hereinafter "Westinghouse") employ, in violation of the Age Discrimination in Employment Act. Plaintiff invoked jurisdiction of the District Court pursuant to 28 U.S.C. §1343 and 29 U.S.C. §621 *et seq.* A jury returned a verdict in favor of Plaintiff for $55,710.00 in actual damages, which was reduced by a remittiture of $11,275.00 filed by Plaintiff. Upon appeal to the Court of Appeals for the Eighth Circuit the judgment of the district court was affirmed.

Plaintiff was continuously employed by Defendant from 1964 until July 31, 1978. In December, 1977 Plaintiff was first informed of his termination. He was asked to sign an early retirement form which Plaintiff did not sign at that time. Because of an illness Plaintiff remained employed by Defendant until he was given his alternative on July 28, 1978. The alternative Plaintiff was given was to either resign July 31, 1978 or face termination on August 1, 1978. Plaintiff chose to resign "under protest."

From December, 1977 when Plaintiff first heard of his termination to July 31, 1978 he applied for four separate positions in Defendant corporation. Although Plaintiff was qualified for each position, all four were filled by younger, less qualified persons.

Specifically, the facts pertaining to each job are discussed below:

1. *Chicago Job.* The man who filled this job had no experience as a business development representative (Tr. 310). Plaintiff had over ten (10) years of direct experience in the job of business development representative. This was the same type of

job Plaintiff held prior to his termination. Plaintiff was not offered the position and was not even considered for the job (Tr. 93, 310).

2. *Kansas City Job.* Defendant asserted that Plaintiff was not qualified for this job because he did not have a college education (Tr. 198). However, the man who was hired for the position did not have a college degree (Tr. 338). Defendant acknowledged that Plaintiff's area of expertise was in heating and air conditioning (Tr. 280). The man hired for the job had only four years of limited experience in heating and air conditioning and was not familiar with the geographical area. Plaintiff was not offered this job and his written requests concerning it were not answered by Defendant.

3. *Florida Job.* Although the job title was different, this job was the same as that held by the plaintiff. (Tr. 11, 205, 218, 244). Defendant did not contact or interview Plaintiff for the position which was filled one month before Plaintiff was forced to resign (Tr. 214).

4. *St. Louis Job.* As a generalist, Plaintiff had a working knowledge of the lamp division and could have filled this position (Tr. 189). In fact, Tribble had assisted the lamp division representative in attempting to make a sale (Tr. 79). The company hired a 28 year old man from outside the company for this job (Tr. 11, 77).

Petitioners contend that Plaintiff failed to produce sufficient evidence at trial to establish age discrimination. However, the District Court and the Eighth Circuit held there was sufficient evidence to establish age discrimination.

There is nothing in the Eighth Circuit's decision to warrant consideration by this Court. The Eighth Circuit's decision is not in conflict with any of the decisions of this Court or any of the circuit courts of appeals. This Court granted certiorari in

Furnco Construction Co. v. Waters, 98 S.Ct. 2943 (1978) to resolve "important questions raised by [Furnco] regarding the exact scope of the prima facie case: in age discrimination cases" and the "nature of the evidence necessary to rebut such a case." *Furnco* at 2945-2946, 2948. The Eighth Circuit has followed the decisions articulated by this Court and this appeal does not raise any novel questions regarding age discrimination that are of public concern or are of any importance to justify review by this Court.

REASONS FOR DENYING THE WRIT

The Eighth Circuit correctly decided the issues and its decision is not in conflict with any decisions of this Court or of any other Federal Court of Appeals.

I.

The proper allocation of burdens and order of presentation of proof under the Age Discrimination and Employment Act are well established following a line of decisions by this Court and need not be reviewed.

This Court is once again faced with the question of what burdens are placed on Plaintiff and Defendant in a cause of action brought under the ADEA. The Court has previously provided the answer to this question by reiterating principles established in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

The principles established in *McDonnell Douglas* have been laid down in subsequent decisions by this Court, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Board of Trustees of Keane State College v. Sweeney*, 439 U.S. 24 (1979); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978) and have consistently been applied to age discrimination cases by "virtually" all the Courts of Appeals. (Petitioner's Brief, p. 9). In *Lorillard v. Pons*, 343 U.S. 575 (1978) the Court noted that "the [substantive] prohibitions of the ADEA were derived in *Haec Verba* from Title VII". *Lorillard* at p. 584.

In short, this Court established the order and allocations of burdens of proof for Plaintiff and Defendant under the ADEA in *McDonnell Douglas*. These principles have been adhered to by this Court and the Courts of Appeals in subsequent decisions and there is no need for the Court's review.

II.

The Eighth Circuit was consistent with *Texas Department of Community Affairs v. Burdine* in holding that when the employer rebuts the employee's prima facie case by articulating a legitimate, nondiscriminatory reason for the employee's discharge a genuine issue of fact is raised and the case is submissible to the trier of fact.

In *Tribble,* Westinghouse appealed contending the District Court erred in denying its Motion for a Directed Verdict or in the Alternative a Motion for a New Trial. Petitioners believe *Burdine* holds once the employer rebuts the employee's prima facie case by articulating a legitimate nondiscriminatory reason and the Plaintiff does not then come forward with evidence to show the employer's reasons were pretextual, the employer is entitled to a directed verdict. This is not what *Burdine* holds.

Under the principles enumerated in *Burdine* the Plaintiff retains the burden of persuading the trier of fact that age was a determining factor in his discharge or failure to maintain employment. *Burdine* at p. 253. The Plaintiff prevails if he persuades *the trier of fact* that an employer's decision was more likely based on an unlawful motivation such as age. "The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the Court expeditiously and fairly to the ultimate question." *Burdine* at p. 253.

The prima facie case creates a rebuttable presumption that the employer unlawfully discriminated against the employee. An inference of discrimination is raised "only because we presume these facts if otherwise unexplained are more likely than not based on a consideration of impermissible factors." *Burdine* at p. 254 quoting *Furnco* at p. 577. If the employer is silent after the Plaintiff proves his prima facie case, and the trier of fact believes the Plaintiff's evidence, then the Plaintiff is entitled to a verdict because "no issue of fact remains in the case." *Id.*

The burden that shifts to the Defendant is to rebut the presumption of discrimination by articulating a legitimate nondiscriminatory reason for rejecting the Plaintiff. In *Sweeney* and *Burdine* this Court held that "articulate" did not mean "proving". *Burdine*, at 253; *Sweeney*, at 25. The Defendant need only present evidence which raises a genuine issue of fact whether or not the Plaintiff was a victim of discrimination. *Burdine* at 254, 255. If the Defendant meets this burden the Plaintiff's presumption is rebutted and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255.

It is at this stage of the proceeding that Petitioner is confused. By rebutting the Plaintiff's presumption of discrimination the Defendant is not entitled to a directed verdict. *Burdine* noted that by rebutting the presumption, "we do not mean to imply that the trier of fact no longer may consider evidence previously introduced by the Plaintiff to establish a prima facie case." *Id.* at 255 no. 10. The Court continued:

> [N]onetheless the evidence and inferences [plaintiff's prima facie case] properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed there may be some cases where the plaintiff's initial evidence combined with effective cross examination of the defendant will suffice to discredit the defendant's explanation. *Id.*

Thus, when the Defendant has rebutted the Plaintiff's presumption, the evidence from the prima facie case is not per force dropped from the trier of fact's deliberations.

The Eighth Circuit adhered to these principles and the reasoning behind them. Plaintiff presented his prima facie case, creating a presumption of discrimination against the Defendant. The

Defendant offered evidence of a legitimate nondiscriminatory reason for discharging Plaintiff. At this stage, the trier of fact could still "find that the wrong occurred in the manner established by the plaintiff." *Tribble v. Westinghouse*, 669 F.2d 1193, 27 F.E.P. Cases 1596, 1598 (8th Cir. 1982).

The rebuttal raised a genuine issue of fact as to whether Defendant discriminated against Plaintiff on the basis of age. The trier of fact could have believed either side. The jury accepted Plaintiff's version and the Eighth Circuit affirmed.

Petitioners contend Plaintiff failed to produce sufficient evidence to prove discrimination. Plaintiff relied on the evidence proffered in his prima facie case and evidence produced on cross examination of Defendant's witnesses.

Specifically, Respondent established that during the interim betweeen Plaintiff's notification of his termination and the termination date, Plaintiff applied for a number of jobs within Defendant organization. Plaintiff was sufficiently qualified for each position. Each position was filled by a younger, less qualified person. Plaintiff chose early retirement over protest one day before his termination date because he would have been discharged otherwise. This was sufficient evidence for the jury to infer that it was more likely true than not that Plaintiff was discriminated against because of his age.

Quite simply, this case involved the trier of fact hearing all the evidence, weighing that evidence, and determining that Tribble was discriminated against due to age. This case raises no weighty issues worthy of Supreme Court consideration.

III.

The decision of the Eighth Circuit is not in conflict with the decisions of this Court or the courts of appeals in holding that an ADEA case is submissible to the trier of fact after the Plaintiff presents its prima facie case and the Defendant articulates a legitimate nondiscriminatory reason for its actions.

Petitioner claims that the Eighth Circuit's opinion is in conflict with decisions from other circuits. An analysis of these cases supports a contrary conclusion.

In *Smith v. Flax*, 618 F.2d 1062 (4th Cir. 1980) the Fourth Circuit affirmed the District Court's granting Defendant's Motion for Judgment Notwithstanding the Verdict. The trial court granted Defendant's Motion because the Plaintiff had not presented enough evidence to establish an inference of age discrimination on the part of the employer. At trial, there was an overwhelming amount of evidence regarding Smith's incompetency.

The only evidence that raised an inference of discrimination was Smith's own testimony which the trial court ruled irrelevant. *Id.* at 1066. However, even in *Smith* the Appeals Court stated that:

> . . . the question should not be taken from the jury *if there is evidence in a case which if accepted by the jury* would support a finding that age was a determining factor in the discharge but we conclude there is insufficient evidence to support such a finding in this case. *Id.* (emphasis supplied)

In *Tribble* there was ample evidence that Tribble was qualified for other positions throughout Defendant's organization. These positions were filled by younger, less qualified persons after Tribble had applied for them. The Eighth Circuit believed that this fact and others were sufficient so that "the jury could infer that the reason for Plaintiff's discharge was age." *Tribble* at 1599.

The other cases cited by Petitioner do not rise to the level of conflicts between the circuits, rather they deal with the question of quantitative evidence. In *Simmons v. McGuffy Nursing Home, Inc.*, 619 F.2d 369 (5th Cir. 1980), *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980) and *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d (6th Cir. 1982) all the Courts found insufficient evidence to warrant submission of a genuine issue of material fact to the trier of fact.

These cases do not represent a conflict between circuits, they represent a difference in the quantity and quality of evidence. If these cases stand for conflict between circuits, then this Court will be required to review all cases in which the jury could have found for one party or the other—hardly within the province of the Supreme Court.

IV.

The Eighth Circuit was consistent with the decisions of other Courts of Appeals in holding that a 63 year old employee who was forced to retire or be fired had established a prima facie case of age discrimination.

In its final point for review, the Petitioner again attempts to couch quantity of the evidence issues under the guise of a failure to present a prima facie case and conflict among circuits.

Petitioner contends the Plaintiff failed to establish a prima facie case because he did not produce any evidence that he was qualified for the jobs for which he applied and he did not apply for two jobs.[1] (Petitioner's Brief p. 19). Petitioner is again mistaken. Plaintiff is a member of the protected class. After Plain-

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[1]Interestingly, it was Petitioner who in its defense attempted to insulate itself by making much of its Key Personnel Service Department in Pittsburgh which allegedly sought to place individuals displaced by reorganization. In essence saying, "there is no need to apply for jobs, we will locate employment for you." See also footnote [3] *infra*.

tiff was discharged he applied for and was rejected, or not even considered by Defendant, for positions similar to the one he previously held in Defendant organization.[2] These positions were subsequently filled by younger, less qualified persons. The Eighth Circuit and the District Court recognized the sufficiency of Plaintiff's evidence. In short, Plaintiff met and proved the criterion this Court outlined in *McDonnell Douglas, supra.*

Petitioner also contends Plaintiff failed to establish a prima facie case of discriminatory discharge, citing *Cova v. Coca Cola Bottling Co.*, 674 F.2d 958 (8th Cir. 1978).

Specifically, Petitioner contends Plaintiff failed to establish a prima facie case because his job did not remain open and he was not replaced by a younger person. (Petitioner's Brief, p. 19).

In *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 5 F.E.P. 355 (2nd Cir. 1981) the Second Circuit held that Plaintiff had failed to make out a discrimination case under *McDonnell Douglas* since "he did not prove that he was replaced after the discharge, or even that the position was kept open." *Stanojev* 25 F.E.P. at 259. Petitioner has glossed over the facts of this case in asserting its similarity to *Tribble.* Stanojev's position was Vice President of Special Assignments. The position never existed before or after Stanojev held it. This position was created simply to keep Stanojev after he had been demoted from his previous position. Further, Stanojev never sought another position after he was discharged from Vice President of Special Assignments. Stanojev's position was eliminated after he was discharged because it never was an official position. It was Stanojev's incompetence that eliminated the position not a

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[2]One must be cognizant that the jury was presented with evidence of four job openings, the jury could have found that Tribble was qualified for any *one* of these jobs. We will never know if the jury considered Tribble qualified for one or all four.

corporate reorganization 25 F.E.P. at 359. Accordingly the Second Circuit held that "Stanojev had not proved anything other than a legitimate reason i.e. elimination of the position as his own incompetence. Therefore an inference of discrimination could never be raised in this matter." *Id.*

Tribble's job was eliminated in a corporate effort to cut costs. It was not eliminated because of his incompetence. Tribble sought similar positions to the one from which he was discharged within Defendant's organization which were subsequently filled by younger, less qualified individuals.

In *Sahadi v. Reynolds Chemical,* 636 F.2d 1116 (6th Cir. 1980) the Sixth Circuit affirmed the lower Court holding that Plaintiff had failed to establish a prima facie case because "there were no facts in the record from which the jury could reach the conclusion that age discrimination occurred unless they were allowed to indulge in guess and speculation." *Sahadi,* at 1117. Sahadi's job was eliminated in order to cut costs. After Sahadi was discharged his job did not remain open. The decision was to eliminate a separate position of "color matchers". His duties were assumed by a more skilled employee who was also within the protected age group under the ADEA. The Sixth Circuit held that under all the evidence presented at trial "there was simply no reasonable inference to suggest that the plaintiff was discriminated against because of age." *Id.*

Tribble's position was eliminated altogether. His duties were assumed by no one. Tribble applied for jobs similar to the one he was discharged from. They were filled by younger, less qualified persons. Under these circumstances the trial court and the Eighth Circuit believed there was sufficient evidence to raise an inference of age discrimination.

In discussing various reasons for discharge the *Sahadi* Court noted that "age would not have to be the sole reason but only a contributing factor in connection with the discharge". *Id.* The

ultimate fact to be decided is the same burden the Plaintiff retains throughout the case. Plaintiff must ultimately prove age was a factor in his discharge. However, the Plaintiff in *Sahadi* failed to do this. Tribble unquestionably produced sufficient evidence to raise an inference that age was a determining factor in connection with his discharge.

In *Price v. Maryland Casualty Co.*, 561 F.2d 609, 16 F.E.P. 84 (5th Cir. 1977), a corporate division of Maryland Casualty was not performing up to expected levels. A decision was made that one of the three representatives would have to be eliminated to match costs with revenues. Price was chosen because he "was the most expendable of the three". *Price* at 86. In affirming the District Court, the Fifth Circuit noted that the decision to discharge Price was based on evidence of company records that showed Price was not generating as much business as the other two. The Defendant's decision was to eliminate the lowest performer.

Tribble was not discharged for low performance. Tribble's position was eliminated due to corporate reorganization. These are distinct fact patterns.

Petitioner contends the Eighth Circuit failed to recognize that when a position is eliminated in a company a similar vacant position need not be filled by the discharged employee. (Petitioner's Brief, p. 21). Rather, as Petitioner points out the company may choose the more qualified person. The Eighth Circuit also recognized this fact. Plaintiff produced sufficient evidence to show he was qualified for the jobs. The evidence showed he was more qualified than the persons who received the jobs. The company hired younger, less qualified persons. The trier of fact believed the decision to terminate Tribble was on the basis of age. The Eight Circuit held there was sufficient evidence for the trier of fact to decide such a factual question.

Finally, Petitioner is mistaken in contending the Sixth Circuit in *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th

Cir. 1982) held that giving an employee the choice between early retirement and termination does not constitute an element of the prima facie case under the ADEA. (Petitioner's Brief, p. 22). The Sixth Circuit affirmed the District Court's holding that *Ackerman* had failed to establish a prima facie case because Ackerman voluntarily resigned instead of being discharged. Whether election of early retirement over discharge was the basis for the Sixth Circuit's decision is not at issue in *Tribble*. Tribble did not voluntarily retire. Tribble was faced with a Hobson's choice—either retire or be discharged. An employer is not free to mask discharge under the rubric of a so-called early retirement. This Court need not establish any guidelines because Tribble was given a choice—retire or be fired. Thus, no issue is raised requiring the establishment of guidelines to deal with cases concerning election of early retirement.

In short, this case presents no new questions or novel issues before the Supreme Court. The Supreme Court established these guidelines in *McDonnell Douglas* and *Burdine*. The Eighth Circuit adhered to the procedures and purpose behind those decisions. The District Court and the Eighth Circuit both held that the Defendant and the Plaintiff had produced sufficient evidence for the trier of fact to hold that the corporate reorganization as well as age could have been the determining factor in the Plaintiff's discharge. The trier of fact decided that age was the determining factor in the Plaintiff's discharge and accordingly found for the Plaintiff.

CONCLUSION

For the foregoing reason , the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JEFFREY E. HARTNETT

BARTLEY, GOFFSTEIN, BOLLATO & LANGE
130 South Bemiston, Suite 604
St. Louis, Missouri 63105
314/727-0922

Attorneys for Respondent

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IN THE

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v.

GEORGE TRIBBLE,
Plaintiff-Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

PETITIONER'S REPLY BRIEF

RICHMOND C. COBURN
JOHN R. MUSGRAVE
RUTH M. ZIMMERMAN
COBURN, CROFT & PUTZELL
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
314-621-8575
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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NOTE: The listing of all subsidiaries and affiliates of Westinghouse Electric Corporation, as required by Supreme Court Rule 28.1, was previously submitted in the Petition for a Writ of Certiorari.

REPLY TO PLAINTIFF'S STATEMENT OF THE CASE

In response to plaintiff's Brief in Opposition, petitioner, Westinghouse Electric Corporation ("Westinghouse"), notes at the outset that plaintiff's "Statement of the Case" contains blatant errors and misstates or mischaracterizes certain evidence and law necessary to determine whether the Eighth Circuit properly applied the law as set down by this Court in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), and its predecessors. This point is well illustrated by the fact that very few of the statements made in plaintiff's Statement of the Case are supported by citations to the record in the case, and many of the citations which are made do not support the statements made by plaintiff. Although Westinghouse will not at this time point out every misstatement or error contained in plaintiff's Statement of the Case, as they are too numerous to discuss in detail, this discussion will set forth several examples of the misstatements and errors contained therein.

Plaintiff submits that "he applied for four separate positions in Defendant corporation. Although Plaintiff was qualified for each position, all four were filled by younger, less qualified persons." Plaintiff's Br. 2. However, the evidence showed that plaintiff applied for only two jobs within Westinghouse: the job in the RCAC Division and the job in the Lamp Division (Tr. 69, 72). There was *no* evidence that plaintiff had ever applied for the job in Chicago, and there is direct testimony that plaintiff *did not* apply for the job in Southeast Florida (Tr. 214).

Plaintiff also repeatedly claims that he was qualified for each of the four positions in question, but makes no citation to the record. However, Plaintiff's own testimony revealed that his only work experience in the last twelve years had been that of a business development representative in St. Louis, Missouri and Memphis, Tennessee (Tr. 52, 105). Similarly, plaintiff's recurring statements that the persons who did fill those positions were

"less qualified" than plaintiff is a conclusory statement, totally unsupported by the evidence.[1]

Plaintiff continually ignores the evidence of record. Plaintiff states that "[t]he man who filled [the Chicago job] had no experience as a business development representative." Plaintiff's Br. 2. However, the man who filled the job had already worked for the person who hired him, as an active member of Westinghouse's business development team in the Chicago area (Tr. 304). Furthermore, the man who filled the job had other qualifications which made him well-suited to the job (Tr. 304-307). Finally, although plaintiff complains that he did not obtain this job, he never even applied for it.

Plaintiff also submits that "Defendant asserted that Plaintiff was not qualified for [the Kansas City] job because he did not have a college education (Tr. 198). However, the man who was hired for the position did not have a college degree (Tr. 338)." Plaintiff's Br. 3. However, plaintiff has conveniently excised a portion of Westinghouse's statement, in an attempt to intentionally mislead this Court. The entire statement indicated that plaintiff did not obtain that job "because he did not hold a college degree *and did not have broad enough experience or qualification in the area to compensate for the lack thereof.*" (Tr. 198) (emphasis added). Westinghouse further asserted that the man hired for the job *did* have the requisite experience to compensate for the lack of a college degree (Tr. 198). Obviously, when the statement made by Westinghouse is taken in its entirety, it has a very different meaning than that asserted by Plaintiff in the distorted excerpt set forth in plaintiff's brief.

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[1] There is no evidence in the record to support plaintiff's contention. In contrast, Westinghouse cited extensive evidence in the record in its Petition for a Writ of Certiorari (at p. 6) to support its statement that the persons who were hired or transferred into the jobs in question were more qualified for those jobs than was plaintiff.

Plaintiff also states that the man hired for the job in Kansas City "had only four years of limited experience" (Plaintiff's Br. 3). However, the evidence was uncontroverted that, for the last four years, that man had been very successful in his employment, and had been doing the exact job which the job at Westinghouse now required him to teach others to do (Tr. 158, 332, 334-335). There was no evidence that that experience was "limited", or that plaintiff had similar experience.

Plaintiff further concludes that "[a]lthough the job title [of the Florida job] was different, this job was the same as that held by the plaintiff." Plaintiff's Br. 3. Plaintiff again ignores the extensive uncontradicted testimony that the Area Manager job required managerial expertise and bilingual capabilities not possessed by plaintiff, and not involved in any business development representative's job (Tr. 207-213, 219, 222-238, 249, 252-253). Also, plaintiff did not apply for this job (Tr. 214).

Finally, as there was no evidence that plaintiff had the requisite qualifications for the position in the Lamp Division, plaintiff's statement that he "could have filled" that position is totally unsupported by the record and is merely a self-serving conclusion (Plaintiff's Br. 3). Such a statement, supported only by a citation to a statement that plaintiff, as a business development representative, "*should have had* knowledge of all [Westinghouse] products," is improperly included in a statement of facts, as it merely represents plaintiff's own opinion of himself (see Tr. 189, cited by plaintiff). The person who hired the man to fill the job in the Lamp Division testified extensively as to the requirements for the job (Tr. 166-167, 172-177, 182-185). Plaintiff never adduced any evidence that he met those requirements. Thus, there was no evidence that he "could have filled" that position. Certainly, plaintiff's assistance to a Lamp Division representative in *attempting* to make a sale did not qualify him for the actual job, along with all its techincal qualifications, especially since, although not mentioned by plaintiff, the sale was never made (Tr. 191-192).

Plaintiff not only misstates the facts to this Court, but, in his Statement of the Case, he misquotes this Court by arguing that

> [t]his Court granted certiorari in *Furnco Construction Co. v. Waters,* 98 S.Ct. 2943 (1978) to resolve "important questions raised by [Furnco] regarding the exact scope of the prima facie case: in age discrimination cases" and the "nature of the evidence necessary to rebut such a case." *Furnco* at 2945-2946, 2948.

Plaintiff's Br. 3-4. However, *Furnco* is a case concerning race discrimination, and does not discuss age discrimination at all. Plaintiff has attributed statements to this Court which were never made. Plaintiff apparently cannot make his argument without misstating both the evidence *and the law as previously determined by this Court.* This demonstrates that plaintiff's arguments are without basis in law, and that this appeal does raise issues which have not been resolved by this Court.

REASONS FOR GRANTING THE WRIT REPLY ARGUMENT

Petitioner notes at the outset that, throughout his argument, plaintiff misstates the facts and mischaracterizes the evidence, as discussed more fully in petitioner's reply to plaintiff's Statement of the Case.

I. The Eighth Circuit's Decision Raises Important Questions Regarding The Proper Allocation Of Burdens And Order Of Presentation Of Proof Under The Age Discrimination In Employment Act Which Have Not Been Settled By This Court.

Plaintiff relies upon the case of *Lorillard v. Pons,* 434 U.S. 575 (1978) in stating that his Court has already established the order and allocations of burdens of proof in a case brought under the Age Discrimination in Employment Act ("ADEA"), by drawing an analogy between the ADEA and Title VII of the Civil Rights Act of 1964. However, plaintiff has taken a small part of the *Lorillard* opinion out of context, thereby altering its

meaning. This Court's full statement as to the similarity between Title VII and the ADEA is as follows:

> Petitioner strives to . . . [compare] the ADEA with Title VII of the Civil Rights Act of 1964. . . . we find petitioner's argument by analogy to Title VII unavailing. There are important similarities between the two statutes, to be sure, both in their aims - the elimination of discrimination from the workplace - and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII. But in deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences. . . . Petitioner's reliance on Title VII, therefore, is misplaced.

434 U.S. at 584. This Court then went on to discuss the differences in the two statutes in detail.

In *Lorillard,* this Court held that an ADEA plaintiff has a right to a jury trial, and recognized that such a right did not necessarily exist under Title VII. 434 U.S. at 584-585. *See Great American Federal Savings & Loan Ass'n.,* 442 U.S. 366, 375 (1979). This distinction is significant when comparing the standards for the allocation of burdens in a Title VII case to the allocation of burdens in an age discrimination case. In a non-jury trial, all the issues are decided by the court, whereas in a case tried to a jury, no issues should be submitted to the jury if no issues of fact exist. It is therefore important for this Court to set standards as to the effect of an ADEA plaintiff's presentation of a prima facie case, and the effect of the ADEA defendant's rebuttal of that prima facie case by the presentation of legitimate, nondiscriminatory reasons for its actions.

II. In Light Of *Texas Department Of Community Affairs v. Burdine,* The Eighth Circuit Erred In Holding That There Was Evidence Of Discrimination Where The Employer Produced Evidence Of Legitimate, Nondiscriminatory Reasons For Its Actions, And There Was No Direct Evidence Of Discrimination And No Evidence Of Pretext.

Plaintiff contends that *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), holds that if a plaintiff raises a prima facie case of discrimination and the defendant rebuts the prima facie case by articulating legitimate, nondiscriminatory reasons for its actions, there is always an issue of fact remaining to be submitted to the jury. This ignores the clear holding and intent of *Burdine* which states that if the defendant carries its burden of articulation, "the presumption raised by the prima facie case is rebutted." *Id.* at 255.

This Court indicated its intent as to the effect of the defendant's rebuttal by stating that

> [t]he plaintiff . . . now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. . . . [The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Id. at 256. The plaintiff may satisfy that burden either in the initial presentation of his evidence or in his rebuttal - but he must, at some time, present some direct evidence of discrimination or evidence of pretext to support his case, once the inference raised by his prima facie case has been rebutted. As detailed in Westinghouse's Petition for a Writ of Certiorari at pages 11 and 13-14, plaintiff *never* presented any direct evidence of discrimination or evidence of pretext.

III. The Eighth Circuit's Decision Conflicts With The Decisions Of Other Courts Of Appeals With Respect To The Determination Of Whether A Plaintiff Makes Out A Submissible Jury Case Of Discrimination Where The Defendant Presents Evidence Of Legitimate, Nondiscriminatory Reasons For Its Actions.

Plaintiff argues that the cases cited by Westinghouse, illustrating a conflict between the Eighth Circuit and other circuit

courts of appeals, deal only with "the question of quantitative evidence." Plaintiff's Br. 10. Those authorities, however, as well as the present case, involve a total dearth of evidence of discrimination, other than the plaintiffs' own conclusory allegations. In those cases, as in the present case, the question was not the sufficiency of the evidence, but rather whether there was *any* evidence at all to raise an issue of fact.

For example, in *Smith v. Flax*, 618 F.2d 1062 (4th Cir. 1980), the court found that, assuming a prima facie case had been made, it was sufficiently rebutted. *Id.* at 1066. Because there was *no* other evidence of discrimination, the court found it was proper to refrain from submitting the case to the jury. *Id.* Plaintiff notes the court's statement in *Smith* that the "only evidence that raised an inference of discrimination was Smith's own testimony which the trial court ruled irrelevant. *Id.* at 1066." Plaintiff's Br. 9. Similarly, the only evidence presented by the plaintiff in this case as to his ability to fill positions other than his own was his own self-serving statements that he "could have" filled those jobs, and there was no evidence that the persons who did fill those jobs were less qualified than plaintiff. Thus, the plaintiff in this case has not pointed to any direct evidence of discrimination or evidence of pretext, as there was none. The Eighth Circuit's decision in this case to the contrary is, therefore, in direct conflict with that of the Fourth Circuit in *Smith v. Flax.*

Finally, plaintiff states that if the cases cited by Westinghouse "stand for conflict between circuits, then this Court will be required to review all cases in which the jury could have found for one party or the other...." Plaintiff's Br. 10. However, petitioner is not asking that this Court review conflicts regarding the factual issues in a case, but that this Court review the conflict between the circuits regarding the proper allocation of burdens in an age discrimination case. The Fourth, Fifth, Sixth and Seventh Circuits have held that no issue of fact exists where the plaintiff's prima facie case is rebutted by the defendant's articulation of legitimate, nondiscriminatory reasons for its ac-

tions and the plaintiff at no time presents direct evidence of discrimination or evidence of pretext, whereas the Eighth Circuit has now held that issues of fact *do* exist under those same circumstances. Westinghouse has asked for this Court's review to resolve the conflict in the standard being applied to determine whether the evidence presented raises issues of fact. Such a standard can then be applied by all federal courts, uniformly, without the necessity of this Court's further review.

IV. The Eighth Circuit's Holding That A Sixty-Three-Year-Old Employee Who Elected Early Retirement After His Position Was Eliminated Due To Adverse Economic Conditions Established A Prima Facie Case Of Age Discrimination Conflicts With Those Of Other Courts Of Appeals.

Plaintiff claims that Westinghouse, "in essence," told him that "there is no need to apply for jobs, we will locate employment for you," (Plaintiff's Br. 10, n. 1), and thereby discriminated against plaintiff because no other job was found. However, at the same time that Westinghouse was attempting to find other placement for plaintiff, Westinghouse informed plaintiff, by letter to his counsel, that

> [a]lthough we are attempting to relocate Mr. Tribble, he should understand that there is no absolute guarantee of his placement, and therefore, our efforts should not preclude him from seeking employment both outside and inside the Company on his own.

Defendant's Ex. PP; *see* Tr. 272, 278-279, 289, 291.

As to plaintiff's discussion of *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981), petitioner maintains that that case *is* similar to this case. In order to bolster his argument that the cases are distinguishable, plaintiff misquotes a portion of the *Stanojev* opinion, attempting to indicate that Stanojev's position was eliminated due to his incompetence (Plaintiff's Br. 12). However, the Second Circuit actually noted that "[Stanojev] has not proved that his dismissal resulted from anything

other than a legitimate reason, i.e. elimination of the position *or* his own incompetence. Therefore, an inference of discrimination could not be raised in this manner." 643 F.2d at 920 (emphasis added). Similarly, in the present case, plaintiff did not prove anything other than that his job was eliminated for a legitimate reason,[2] and thus, under *Stanojev,* no prima facie case was made because no inference of discrimination was raised. The Eighth Circuit, however, in its opinion below, has now held to the contrary.

Plaintiff also notes that his "position was eliminated altogether. His duties were assumed by no one." Plaintiff's Br. 12. Plaintiff has admitted that his position did not remain open. Therefore, he cannot establish a prima facie case of age discrimination under the guidelines of *Cova v. Coca-Cola Bottling Co.,* 574 F.2d 958, 959 (8th Cir. 1978). (See Petition at p. 19). Yet, the Eighth Circuit, contradicting itself, held below that a prima facie case was established.

This case is also similar to *Price v. Maryland,* 561 F.2d 609 (5th Cir. 1977), although the Eighth Circuit's decision conflicts with the Fifth Circuit's decision in *Price.* As plaintiff notes, Price was discharged because he was the "most expendable," and a job had to be eliminated to match costs with revenues. *Id.* at 612. Similarly, in this case, plaintiff's position was eliminated in order to match costs with budgeted funds available, (see footnote 2, *infra*), and Westinghouse determined which positions to eliminate (a total of nine out of twenty) by determining which positions were most expendable: "We looked very carefully at the potentials within a piece of geography and determined from the potentials whether or not we could somewhat overlook that area of responsibility." Tr. 259-260.

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[2] It is interesting to note that plaintiff recognizes that his job "was eliminated in a corporate effort to cut costs," rather than for reasons related to his age (Plaintiff's Br. 12).

In his discussion of *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982), plaintiff attempts to distinguish his case by stating that he did not voluntarily retire, since he had only the choice of retiring or being discharged. Plaintiff's Br. 14. However, those are the same choices Ackerman had, yet the Sixth Circuit found there was no prima facie case because Ackerman voluntarily retired. The plaintiff in this case made the same choice. (See Petition at p. 22). The Eighth Circuit's decision in this case and that of the Sixth Circuit in *Ackerman* therefore are in direct conflict.

CONCLUSION

Plaintiff has attempted to bolster his arguments with misstatements of fact and law. When the facts in evidence are considered, and the law correctly stated, this case does raise issues which have never been decided by this Court. If, however, this Court finds that its decision in *Texas Department of Community Affairs v. Burdine* is applicable, then the Eighth Circuit's decision is directly in conflict with the law as set out by this Court. The Eighth Circuit has likewise made a decision in conflict with decisions of other federal courts of appeals, with respect to both (1) the determination as to whether any fact issues exist, and (2) the determination as to whether a prima facie case of age discrimination has been established.

Based on the foregoing reasons and authorities, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RICHMOND C. COBURN
JOHN R. MUSGRAVE
RUTH M. ZIMMERMAN
COBURN, CROFT & PUTZELL
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
Attorneys for Petitioner